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No. 89-217

IN THE

Supreme Court of the United States

October Term, 1989

RAPHAEL GREGORIAN and
CALIFORNIA INTERNATIONAL TRADE CORPORATION,
Petitioners,

v.

V/O MEDEXPORT and V/O LICENSINTORG,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit correctly decide that the district court had abused its discretion in refusing to set aside a default judgment on claims of breach of oral contract against an agency of a foreign state, when the agency made a timely appearance at the urging of the United States to request the default be set aside, and when there are unresolved factual questions on which subject matter and personal jurisdiction depend?

2. Did the Ninth Circuit correctly decide that the statutory grant of immunity to foreign states as to their governmental acts, and the explicit grant of immunity to foreign states as to "any claim arising out of . . . libel," 28 U.S.C. § 1605 (a) (5) (B), deprive a district court of jurisdiction on a claim of "libel" against a foreign state, when a "commercial" motive is alleged for the official publication of the foreign state in question?

3. Whether 28 U.S.C. § 517 (authorizing the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States") should not apply to suits pending in the courts of the United States that involve interpretation of the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601 *et seq.*?

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Respondents V/O Medexport and V/O Licensintorg, agencies of the Union of Soviet Socialist Republics, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 871 F.2d 1515.

COUNTER-STATEMENT OF THE CASE

The accreditation of petitioners ("Gregorian") to do business inside the Soviet Union was terminated after two Soviet citizens were convicted of accepting bribes from Gregorian.[1] *Izvestia*, the organ of the Soviet legislature, reported the loss of Gregorian's accreditation and the reasons for that official action. Gregorian thereupon filed suit in the United States District Court for the Central District of California. His complaint against the USSR and various of its agencies and instrumentalities alleges a melange of claims (civil conspiracy, libel, interference with prospective business advantage, multiple breaches of oral contracts, intentional infliction of emotional distress, etc.), and demands over $80,000,000 in "general" damages and $250,000,000 of "punitive" damages.

The Soviet Union refused to appear or to permit its agencies to appear, asserting that sovereign immunity as to the asserted claims is clear from the face of the pleading. The district court entered default judgments on claims of "libel" and breach of oral "contract." Accompanied by television reporters, Gregorian's counsel executed on the default judgments by forcing his way into the residence of, and seizing the typewriter of, a Soviet correspondent for *Izvestia* working in the United States. Tensions mounted, and the United States persuaded the Soviet Union to permit two trading organizations (the respondents in this Court) to appear in

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[1] In his petition for certiorari, Gregorian makes the false assertion that "the attorneys of the executive branch [used] innuendo to sway the appeals court without evidence, hinting at superior information from 'diplomatic' sources," by "discreetly" placing the following in their appellate brief *amicus curiae*:

> It is our understanding that several persons who had dealings with Gregorian have been convicted of bribery in Soviet courts.

Gregorian's Petition for Writ of Certiorari ("Greg. Pet.") p. 34. In fact, an account of the conviction of Soviet citizens Barashkov and Chirvinsky for accepting bribes from Gregorian was placed in the record in these proceedings *by Gregorian*. See District Court Docket Entry No. 108, January 23, 1987, Gregorian's Supplemental Opposition to Defendants V/O Medexport's and V/O Licensintorg's Motions to Vacate Judgment and Dismiss complaints, Exhibit A pp. 14-15.

the district court and seek to set aside the defaults. The United States supported the motion to vacate the default judgments, agreed that the Foreign Sovereign Immunities Act ("FSIA") explicitly preserves immunity as to claims of "libel," and took no position on the merits as to the oral "contract" claim.

The district court, reconsidering, vacated and dismissed as to the "libel" claim in light of the explicit language of the Foreign Sovereign Immunities Act that preserves immunity for foreign sovereigns, their agencies and instrumentalities as to "any claim arising out of . . . libel." 28 U.S.C. § 1605 (a) (5) (B). 658 F. Supp. at 1234. The district court refused, however, to vacate the default judgments on claims of breach of oral "contract." In the view of the district court, the initial failure of the Soviet Union to appear was "culpable." That court likened the position on the question of sovereign immunity taken by the Union of Soviet Socialist Republics to "draft evasion." 658 F. Supp. at 1238.

The Ninth Circuit affirmed the dismissal of the "libel" claim. The court of appeals held that foreign sovereign immunity as to claims of "libel" was preserved by the explicit language of the FSIA, and that petitioner's claim that "trade libel" escaped the bar was a misinterpretation of the statute. 871 F.2d at 1520-1522. The Ninth Circuit reversed as to the oral "contract" default judgments. The court of appeals held that the belief of the Soviet Union that the USSR, its agencies and instrumentalities were entitled to immunity was reasonable on the facts of this case. Since a reasonable belief in immunity is inconsistent with being "culpable" for failing to appear to defend the action, the failure to set aside the default pursuant to Rule 60 (b) was an abuse of discretion. 871 F.2d at 1525-1526. The Ninth Circuit also noted that in the first two years of litigation petitioner had alleged no facts indicating any nexus between the United States and his claims of breach of oral "contract" inside the Soviet Union, a necessary element of both subject matter and personal jurisdiction under the

FSIA. 871 F.2d at 1528.[2] The oral "contract" claims were remanded to the district court for findings with respect to the factual basis for subject matter and personal jurisdiction. *Id.*

REASONS FOR DENYING THE WRIT

The Ninth Circuit has done nothing more than affirm the consensus view that defaults are disfavored and that, with particular regard to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et. seq.* ("FSIA"), Fed. R. Civ. P. 60 (b) must be liberally applied. In regard to the remand on the oral "contract" claims, review is particularly inappropriate because the writ seeks review of the factual questions embedded in the exercise of discretion. And, even if the Ninth Circuit were in error in reversing the district court's exercise of discretion on the Rule 60 (b) (6) order, the course of the litigation would be unaffected as the non-discretionary determination of the basic jurisdictional facts has yet to be made by the district court.

In dismissing the "libel" claim, both lower courts reached the same sensible application of explicit statutory language to the broadcast allegations of petitioner's complaint. This result is not in conflict with the decision of any other court. There is no question presented of importance to anyone other than the petitioner.

In regard to the review sought of the propriety of the United States appearing as *amicus curiae* in the proceedings below, there is no question of law presented. The executive branch has clear statutory authority to attend to the interests of the United States in suits pending in our courts, and authority both fundamental and exclusive as the representative of the United States with regard to foreign nations.

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[2] No pre-litigation writings that support the existence of the claimed "contracts" have ever been produced.

Exercise of Discretion in Setting Aside a Default Poses No Issue Worthy of Review

Relief from a default judgment under Federal Rule of Civil Procedure 60 (b) (6) is a matter of broad equitable discretion. *Klapprott* v. *United States*, 335 U.S. 601, 615 (1949). The factual inquiry entailed by examination of exercise of discretion is generally not worthy of review on writ of certiorari. *Moor* v. *Texas & N.O.R. Co.*, 297 U.S. 101, 105 (1936). No reason exists to disturb that rule here. Both courts below acknowledged that V/O Medexport had timely appeared, and has a good defense. 871 F.2d at 1523; 658 F. Supp. at 1237. The Ninth Circuit disagreed with the district court's characterization of the refusal of the Soviet Union to appear, and the initial prohibition by the Soviet Union of the appearance of V/O Medexport, as "culpable." The essence of the Ninth Circuit's reasoning was that, on the facts and on Gregorian's pleading, the Soviet Union was perfectly reasonable in believing itself and its agencies and instrumentalities to be immune. 871 F.2d at 1525. There can be no question but that, if the Ninth Circuit's view of the facts is correct, its conclusion is correct. A United States court cannot view the reasonable action of a foreign sovereign as "culpable."

The abstract equitable principles applied by the Ninth Circuit are not open to dispute. Defaults are disfavored, and there is a policy to favor a hearing of a litigant's claim on the merits. This is particularly the case in actions involving foreign sovereigns. All other circuits to have considered the question whether it would be abuse of discretion not to vacate a default judgment in similar (FSIA) circumstances have reached the same result. *Hester International Corp.* v. *Federal Republic of Nigeria* 879 F.2d 170 (5th Cir. 1989); *Carl Marks & Co.* v. *USSR*, 841 F.2d 26 (2d Cir.), *cert. denied*, 108 S.Ct. 2874 (1988); *Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987); *Jackson* v. *People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987). Thus insofar as the Ninth Circuit announced any rule

of general application, it merely followed the consensus view requiring the liberal application of Rule 60 (b) on the timely application of a foreign sovereign in default.

The Course of Proceedings Would Be Unaffected by Review

On the oral "contract" claims, the Ninth Circuit remanded and directed the district court to make factual findings as to the questions on which subject matter and personal jurisdiction depend. 871 F.2d at 1526 *et seq.* Whether or not the Ninth Circuit was correct in reversing on the issue of exercise of discretion under Federal Rule of Civil Procedure 60 (b) (6), the determination of the jurisdictional facts pursuant to the FSIA is non-discretionary and unavoidable. *Verlinden B.V.* v. *Central Bank of Nigeria,* 461 U.S. 480, 493 n. 20 (1983). In the absence of subject matter jurisdiction by reason of sovereign immunity, any "attempted exercise of judicial power is void." *United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506, 514 (1940). Review of the factual question of exercise of discretion is yet more inappropriate when the lower courts have still to make the factual determinations upon which subject matter jurisdiction depends.

Dismissal of the Libel Claim Is Not In Conflict with the Decision of Any Other Court; There Is No Issue Which Needs To Be Settled by This Court

The FSIA explicitly preserves immunity as to "any claim arising out of . . . libel . . . " 28 U.S.C. § 1605 (a) (5) (B). No reported decision of a United States court has asserted subject matter jurisdiction under the FSIA on a claim of libel against a foreign sovereign. Petitioner does not contend otherwise. The FSIA is the sole source of subject matter jurisdiction on claims against foreign sovereigns in United States courts. *Argentine Republic* v. *Amerada Hess Shipping Corp.,* 109 S.Ct. 683 (1989).

Petitioner contends that because he has alleged that "the defendants caused the defamatory article to be published in order

to avoid their contractual obligations," the "heart of the dispute is commercial." Greg. Pet. pp. 23-24. Petitioner argues that therefore the "commercial activity" exception to immunity of 28 U.S.C. § 1605 (a) (2) applies, and the unqualified preservation of immunity as to claims of libel of 28 U.S.C. §1605 (a) (5) (B) does not apply. But this argument, rejected by both lower courts, founders at the very start on another explicit provision of the FSIA: "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603 (d). The Ninth Circuit therefore found irrelevant the allegation that the motive for publication was "to avoid contractual obligations." Rather, the controlling fact is the indisputably governmental nature of the publication of *Izvestia*, the newspaper in which appeared the account of Gregorian's corrupt activities and consequent loss of accreditation. 871 F.2d at 1521-1522.

Both lower courts have rejected the reading of the FSIA urged here by petitioner. Indeed, no court has ever read these provisions of the FSIA in the fashion Gregorian demands. There is no dispute to be settled.

Petitioner claims that the foreign state respondents have waived their sovereign immunity by initially failing to appear in the district court. Greg. Pet. pp. 26 *et. seq.* This point was not presented by Gregorian below. Normally this is a bar to review. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). But in any event, the claim is in direct conflict with a prior pronouncement of this Court. "[E]ven if a foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act." *Verlinden B.V.* v. *Central Bank of Nigeria, supra*, 461 U.S. at 493 n. 20.

Petitioner also argues that the Ninth Circuit inappropriately applied the "Act of State" doctrine. Greg. Pet. p. 21. The only mention of the act of state doctrine by the Ninth Circuit was as follows: "[b]ecause we conclude that . . . the FSIA does not pro-

vide subject matter jurisdiction over the libel claim, there is no need for us to rule on the applicability of the act of state doctrine." 871 F.2d at 1518.

The Appearance of the United States Pursuant to 28 U.S.C. § 517 Was Entirely Proper

Gregorian asks this Court to review on writ of certiorari whether United States courts "should consider what the executive branch of our government asserts regarding" the interpretation of the FSIA. Greg. Pet. Questions Presented and pp. 31 *et seq.* "Suggestions of Interest" in private litigations by the Attorney General are provided for by statute, 28 U.S.C. § 517 (authorizing the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States"). Such "Suggestions" have a long history, most particularly in cases involving the "interests" of the United States "in friendly intercourse with other nations and avoiding reprisals by them." *International Products Corporation* v. *Koons*, 325 F.2d 403, 408 (2d Cir. 1963) (Friendly, J.).

For the executive to appear and give its view as to the proper interpretation of the FSIA ("what is and what is not governmental in nature"), is not "intermeddling in the judicial process" as asserted by Gregorian. Greg. Pet. p. 34. This Court has twice had occasion to interpret provisions of the FSIA. *Verlinden B.V.* v. *Central Bank of Nigeria, supra; Argentine Republic* v. *Amerada Hess, supra.* In both cases the United States appeared and gave its views as to the proper interpretation of the relevant provisions of the FSIA.

From respondents' perspective, the United States has but one foreign policy. And, "[a]s Marshall said in his great argument of March 7, 1800 in the House of Representatives, 'The President is the organ of the nation in its external relations, and its sole representative with foreign nations.' " *United States* v. *Curtiss-Wright Export Corporation*, 299 U.S. 304, 319 (1936). Of course, the ex-

ecutive's suggestions are no longer preclusive on questions of sovereign immunity. But Gregorian's argument that the executive's suggestions should not be *considered* is both novel and unsound. No court has ever so held. No issue worthy of review is presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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